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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
12-30 August 1996

DRAFT REPORT OF THE PREPARATORY COMMITTEE

Rapporteur: Mr. Yun YOSHIDA (Japan)

Chapter III

B. Organizational questions (composition and administration of the Court)

Article 5. Organs of the Court

1. With regard to article 5 dealing with organs of the Court, the view was expressed that an indictment chamber for pre-trial procedures should be added, and that it should be composed of three judges with the necessary authority to carry out preliminary investigative matters. Another suggestion was made that there should be no rotation of judges between the various chambers so as to avoid the possibility of having any judge sit on the same case more than once.

2. A proposal was made to create special chambers to deal with certain cases, for example, genocide.

Article 6. Qualification and election of judges

3. It was stressed that the qualification of judges to the International Criminal Court was an issue that needed to be given careful consideration, taking into account the prominence and importance of the future Court. In addition to the qualifications already mentioned in the International Law Commission draft article, it was pointed out that the persons to be elected should also possess experience in humanitarian law and the law of human rights. Other attributes should include high moral character, impartiality, personal integrity and independence. The view was expressed that the reference to "criminal trial experience" should be clearly defined. Doubts were expressed as

to the advisability of establishing for the Court's composition a strict separation between judges with criminal trial experience and those with recognized competence in international law, as this might unduly complicate the election process. Persons competent in both areas were considered ideally suited for such positions.

4. It was pointed out that since the Court to be established should be universal in character, representing all systems of the world, there was the need for balance and diversity in its composition. It was therefore considered important that judges be elected on the basis of equitable geographical representation. In this connection, the formulation of the relevant rule of tne statute of the International Tribunal for the Law of the Sea was recalled. It was also emphasized that the Court's composition should ensure gender balance, particularly in the light of the fact that some of the crimes to be considered by the Court related to sexual assault of women and crimes against children. However, the view was also expressed that there should be no quota system for female judges, nor quotas of any kind, since the sole criteria should be the high qualification and experience of the candidate. It was suggested that rules on qualification and election of judges should be more closely modelled on those governing the International Tribunal for the Former Yugoslavia.

5. In order to attract the most qualified persons, the view was expressed that nomination of candidates for election to the Court should not be confined only to nationals of States parties; nationals of non-States parties should also be permitted. Another view was expressed in this connection that restricting nominations to nationals of States parties would act as an incentive for States to consider becoming parties to the convention. In order to ensure that merit would be a paramount consideration in the election of judges, suggestions were made to the effect that candidates should be nominated either by a nomination committee or by national groups, as in the nomination of candidates for the International Court of Justice.

6. Support was expressed for the idea that the election of judges should be carried out by the States parties to the Court's statute. It was however suggested that elections should be conducted either by the General Assembly, or by the Assembly together with the Security Council, as in the case of the International Court of Justice. According to another point of view, this matter was dependent on the kind of relationship the Court would have with the United Nations.

7. While there was broad support for the idea that the Court should be composed of 18 judges, the view was also expressed that a higher number, for example, 21 or 24, should be considered, depending on the number of Trial Chambers to be created. The view was also expressed that a smaller number should be considered, for example, 15 or even 12, particularly at the beginning, and in order to cut costs. As a cost-saving device, it was also suggested that consideration should also be given to the possibility of electing part-time judges who could be called upon on short notice whenever the need arose. The view was also stressed in this connection that consideration of cost savings should not be a major determining factor in the size or nature of the Court to be created.

8. As for the term of office, while there was general agreement over the proposal of the International Law Commission for a non-renewable nine-year term in order to promote the impartiality and independence of the judges, the view was also expressed that a shorter renewable term (e.g., five or six years) be given serious consideration, in order to ensure geographic rotation and to attract the best qualified persons.

9. A proposal was made that judges should be subject to a retirement age (e.g., at 70 or 75 years). It was also observed that, in such a case, it would be desirable to set an age ceiling for persons being nominated to stand as candidates to the Court.

Article 8. The Presidency

10. It was suggested that the President's duties be limited to ceremonial and administrative functions, and that States parties retain an oversight function over the administrative matters of the Court. It was stated that the line of authority between the President and the Vice-Presidents should be clarified, as well as how decisions are taken within the Presidency (e.g., by consensus, by majority vote). The suggestion was made that the responsibility of the Presidency for the due administration of the Court should include supervision and direction of the Registrar and staff of the Registry, and security arrangements for the defendants, witnesses and the Court. It was also suggested that the functions of the Presidency could be extended to issues such as reviewing decisions of the Prosecutor not to pursue a case. Doubts were, however, expressed as to the appropriateness of the Presidency exercising pre-trial and other procedural functions. In this regard, the establishment of an indictment and/or investigations chamber was suggested.

Article 9. Chambers

11. It was proposed that paragraph 1 of article 9 be clarified, particularly regarding the criteria on the basis of which the Appeals Chamber would be established. A body of opinion favoured a completely separate and independent appellate function and was against the rotation of judges between the Trial Chambers and the Appeals Chamber. It was further proposed that the Appeals Chamber, as well as the Trial Chambers, be elected by the Court rather than appointed by the Presidency, as it was felt that this would enhance the objectivity of the Chambers. The need was also stressed for a mechanism to ensure that there would be a sufficient number of judges with criminal law experience in the Appeals Chamber. The suggestion was also made that pre-trial or indictment chambers should be constituted. It was noted in this connection that they could be permanent or established for a particular case or for a specific time period.

Article 10. Independence of the judges

12. It was pointed out that there were a number of ways to enhance the independence of the judges, such as the election procedure, length of terms,

security of tenure and appropriate remuneration. The view was held that judges should not engage in any activities that would prejudice their judicial functions. In this connection, activities such as part-time teaching and writing for publication were considered compatible with such functions. It was suggested that any question arising in connection with the judges' outside activities should be decided not by the Presidency but by an absolute majority of the Court, a solution that was in line with article 16 of the Statute of the International Court of Justice.

Article 11. Excusing and disqualification of judges

13. The importance of the question concerning the excusing and disqualification of judges was stressed. It was suggested that the relevant article of the International Law Commission draft statute needed further elaboration in this respect. A suggestion was made to the effect that the terms of disqualification of a judge contemplated in paragraph 2 of article 11 should not extend to members of an indictment chamber having acted in this capacity. It was also suggested to include in the statute such specific grounds for the excusing and disqualification of judges as: that the judge is the injured party or a relative of the accused or of the injured party, or a national of a complainant State or of a State of which the accused is a national, or that the judge has acted as a witness, representative, counsel, public prosecutor or judge at the national level in the case involving the accused. Some of the above suggestions for inclusion gave rise, however, to reservations. The proposal was made that States parties should be able to raise questions concerning the disqualification of a judge. It was also suggested that more detailed rules should be developed to govern conflict of interest problems.

Article 12. The Procuracy

14. The view was expressed that the statute should provide for an independent Prosecutor with experience in criminal investigations in order to ensure the credibility and integrity of the Court, and that it might be useful to look at the experience of the tribunals for the former Yugoslavia and Rwanda. It was further stated that the Prosecutor's office should be established to seek the truth rather than merely seek a conviction in a partisan manner. As to the provision concerning the election of the Prosecutor and Deputy Prosecutor, the view was expressed that further elaboration was required. The view was also expressed that the Prosecutor, like judges, should not be allowed to seek re-election, in order to avoid any political overtones associated with a re-election process. It was observed that the rules for disqualification of the Prosecutor needed further elaboration. It was suggested in that connection that he or she should not engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence (e.g., being a member of the legislative or executive branches of the Government of a State). It was also suggested that the Prosecutor should not act in relation to a complaint initiated by his or her State of nationality or involving a person of his or her own nationality or in any case in which he or she had previously been involved in any capacity. There were differing views on the need for disqualification based on nationality issues. It was also

suggested that the grounds for disqualification of the Prosecutor should be similar to those for a judge. It was suggested that the term "Procuracy" was inappropriate and should be replaced by such designation as "the Office of the Prosecution".

Article 13. The Registry

15. It was suggested that there be included in the statute guidance on the qualifications for the Registrar and Deputy Registrar, in order to ensure that such office would be vested in highly qualified persons. It was also suggested that the Registry be under the direction of the Presidency or of the Court. The view was expressed that the functions of the Registrar needed elaboration, and in this regard reference was made to the wording in article 17, paragraph 1, of the statute of the International Tribunal for the Former Yugoslavia.

Article 15. Loss of office

16. The view was expressed that grounds for the removal of judges, the Prosecutor and Deputy Prosecutor should be clearly stated in article 15. It was suggested that further to the grounds contemplated in the International Law Commission draft statute, reference should also be made to the engagement in delinquency, whether officially or privately, which could erode public confidence in the Court. The view was also expressed that a distinction should be made between conduct triggering loss of office and other kinds of conduct deserving less serious disciplinary measures.

Article 16. Privileges and immunities

17. The view was expressed that the privileges and immunities as expressed in the article were too broad and should be limited to official functions. Moreover, the privileges and immunities of the Court's staff should be waivable. A view was expressed that on-site functions of the Prosecutor in a State's territory were different functions than those performed by a diplomatic agent and that, therefore, the Prosecutor did not need full diplomatic privileges and immunities. The point was also made that the scope of the privileges and immunities should be reformulated later after the functions of each body of the Court were well defined.

Article 19. Rules of the Court

18. It was suggested that the rules of the Court should be formulated on the basis of the principles set out in the statute and could initially be reviewed by the States parties. Subsequently, the judges could adopt supplementary rules in accordance with the rules of the Court. The view was expressed that, in the light of the experience of the International Tribunal for the Former Yugoslavia, which had amended its rules nine times, a flexible procedure for amendment of the rules of the Court should be established.